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## Civil Procedure

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# Civil Procedure

## Civil Procedure; civil conspiracy of attorneys

Civil Code § 1714.10 (new).

SB 2337 (Kopp); 1988 STAT. Ch. 1052

Existing case law, *Wolfrich Corp. v. United States Automobile Association*,<sup>1</sup> allows a plaintiff to file a complaint alleging civil conspiracy<sup>2</sup> by an attorney.<sup>3</sup> Chapter 1052 modifies the rule in *Wolfrich*.<sup>4</sup> After Chapter 1052, a plaintiff will not be allowed to include a claim of civil conspiracy against an attorney in a complaint<sup>5</sup> unless the court enters an order allowing the claim to be filed.<sup>6</sup> Chapter 1052 requires a plaintiff to file a verified petition along with sufficient facts to support the civil conspiracy claim.<sup>7</sup> The court must allow the proposed pleading to be filed if the plaintiff establishes

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1. 149 Cal. App. 3d 1206, 197 Cal. Rptr. 446 (1983).

2. *Unruh v. Truck Insurance Exchange*, 7 Cal. 3d 616, 631, 498 P.2d 1063, 1074, 102 Cal. Rptr. 815, 826 (1972) (existing case law allows a plaintiff to bring an action for civil conspiracy if the complaint sufficiently alleges the formation and operation of the conspiracy, the wrongful act or acts done pursuant thereto, and the damage resulting therefrom).

3. *Wolfrich* at 1211, 197 Cal. Rptr. 446, 449 (1983) (attorneys may be liable for tortious acts in conjunction with their clients). However, the court distinguished between conspiracy based legal advice rendered to clients accused of breach of contract for which there is immunity from charges of conspiracy for participating in tortious conduct or acts with their clients for which there is no immunity. *Id.* Attorneys must be free to fully advise and counsel their clients while properly discharging their professional obligations without fear of subjecting themselves to liability. *Id.* Ordinarily, corporate agents acting for and on behalf of the corporation cannot be held liable for inducing a breach of the corporation's contract, since attorneys are in a confidential relationship to the corporation and their action in this respect is privileged. *Wise v. Southern Pacific Co.*, 223 Cal. App. 2d 50, 72-73, 35 Cal. Rptr. 652, 655 (1963).

4. 1988 Cal. Stat. ch. 1052, sec. 2, at \_\_\_\_ (it is the Legislature's intent to modify this decision).

5. CAL. CIV. CODE § 1714.10 (or in any other pleading).

6. *Id.*

7. *Id.* (the facts will be stated in affidavits). Before the court will decide whether the complaint should be filed, the court will serve the petition on the proposed adverse claimant and allow him to submit opposing affidavits. *Id.* This process will toll any applicable statute of limitations. *Id.*

with reasonable probability that the allegation of civil conspiracy will prevail.<sup>8</sup>

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8. *Id.*

## Civil Procedure; durable powers of attorney for health care

Civil Code §§ 2430, 2432, 2432.5, 2444, 2500 (amended); Welfare & Institutions Code § 9701 (amended).  
SB 1855 (Mello); 1988 STAT. Ch. 1543

Chapter 1543 prohibits the appointment of a residential care facility<sup>1</sup> operator or employee as the attorney in fact under a durable power of attorney for health care.<sup>2</sup> Chapter 1543 further prohibits the appointment of a residential care facility operator or employee as a witness to the execution of a durable power of attorney for health care.<sup>3</sup> Chapter 1543 mandates compliance with code requirements in effect when a durable power of attorney for health care form was printed.<sup>4</sup>

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1. See CAL. HEALTH & SAFETY CODE § 1569.2 (definition of a residential care facility for the elderly is dependant upon implementation of three levels of care in those facilities pursuant to CAL. HEALTH & SAFETY CODE section 1569.70).

2. CAL. CIV. CODE § 2432(b)(1). The operator or employee may be designated as the attorney in fact if a relative of the principal and other article requirements are satisfied. *Id.* § 2432.5. Regulations concerning durable powers of attorney for health care previously applied to residential care facilities; however, the definition of a community care facility was changed in 1985 by SB 185. See 1985 Cal. Stat. ch. 1127, sec. 1, at 3808. Compare 1984 Cal. Stat. ch. 1615, sec. 1.5, at 5732 (community care facility definition includes residential care facility for the elderly) with CAL. HEALTH & SAFETY CODE § 1502(a) (community care facility defined without including residential care facility for the elderly). See generally 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* §§ 228-246 (9th ed. 1987) (discussing durable powers of attorney for health care).

3. CAL. CIV. CODE §§ 2432(a)(3)(A), 2432(d)(6)-(7). Existing law prohibits community care facility operators or their employees from witnessing the execution of a durable power of attorney for health care. *Id.* §§ 2432(a)(3)(A), 2432(d)(5).

4. *Id.* § 2444.

## Civil Procedure; ex parte attachments

Code of Civil Procedure § 485.010 (amended).  
SB 606 (Deddeh); 1988 STAT. Ch. 727

Under existing law, a right to attach order<sup>1</sup> or a writ of attachment<sup>2</sup> may be issued at an ex parte hearing if the plaintiff shows that great or irreparable injury would result if the matter were delayed until the noticed hearing.<sup>3</sup> With the enactment of Chapter 727, an ex parte attachment may also be granted if the plaintiff raises an inference that the defendant failed to pay an underlying debt and that the defendant generally fails to pay undisputed debts as they become due.<sup>4</sup> Chapter 727 further provides that until a writ has been issued solely on the basis of the defendant's inferred insolvency, and upon defendant's request, the court must conduct a hearing within five court days<sup>5</sup> to review the issuance of the writ.<sup>6</sup>

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1. See CAL. CIV. PROC. CODE § 484.010 (procedure for obtaining a right to attach order).

2. See *id.* § 484.310 (procedure for obtaining a writ of attachment).

3. *Id.* § 485.010(a). Under existing law, an ex parte attachment may be issued under the following circumstances: (1) There is a danger that the property to be attached will be concealed, substantially impaired in value, or otherwise made unavailable to levy; (2) a bulk sales notice has been recorded and published by the defendant pursuant to Commercial Code section 6101; or (3) an escrow has been opened by the defendant to sell a liquor license under Business and Professions Code section 24074. *Id.* § 485.010(b)(1),(3),(4). The application must also contain an affidavit showing that the property sought to be attached is not exempt from attachment. *Id.* § 485.530(2). Once a right to attach order or writ of attachment is issued by the court, the debtor may not challenge whether the right to attach order should have been issued ex parte. *Id.* § 485.240(b). See *Western Steel and Ship Repair v. RMI*, 176 Cal. App. 3d 1109, 1114, 222 Cal. Rptr. 558, 560-61 (1986) (defendant's precarious financial condition did not warrant issuance of an ex parte writ, but once issued, the debtor may not challenge whether the writ should have been issued without notice). See generally R. WEIL & I. BROWN, CALIFORNIA PRACTICE GUIDE, §§ 9.878-80, 9.919-24 (1981 & Supp. 1988); 6 B. WITKIN, CALIFORNIA PROCEDURE §§ 103-6 (3d. ed. 1985) (ex parte attachment procedure).

4. CAL. CIV. PROC. CODE § 484.010(b)(2). In addition, the plaintiff must state the known undisputed debts of the defendant, that the debts are not subject to bona fide dispute, and the basis for the plaintiff's knowledge concerning the undisputed debts. *Id.*

5. The five days start when the plaintiff is served with the defendant's request. *Id.* § 484.010(c).

6. *Id.*

## Civil Procedure; excessive bonds

Code of Civil Procedure § 996.030 (amended).  
SB 2330 (Kopp); 1988 STAT. Ch. 309

Existing law allows the principal<sup>1</sup> to petition the court or the officer<sup>2</sup> for a reduction in the amount of a bond,<sup>3</sup> only after the bond has been actually posted.<sup>4</sup> Chapter 309 permits the principal to petition for this reduction before the bond is posted.<sup>5</sup>

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1. CAL. CIV. PROC. CODE § 995.170 (definition of principal).

2. The court makes the determination in an action or proceeding, otherwise the officer makes the determination. *Id.* § 996.030(a).

3. *Id.* §§ 995.140(a) (definition of bond), 995.020 (types of bonds covered). *See generally* California Law Revision Commission, *Recommendations Relating to Statutory Bonds and Undertakings*, 16 CAL. L. REV. COMM'N REP. 501 (all general procedural rules relating to over 500 types of bonds were consolidated into one chapter).

4. CAL. CIV. PROC. CODE § 996.030. *See generally* R. WEIL & I. BROWN, CALIFORNIA PRACTICE GUIDE, § 9:641 (1988) (bond is intended to cover damages caused defendant by the issuance of the injunction); *Hummell v. Republic Fed. Sav. & Loan*, 133 Cal. App. 3d 49, 51, 183 Cal. Rptr. 708, 709 (1982) (the judge fixes the bond amount based on probable damages that the enjoined party may sustain in the action).

5. *Id.* § 996.030(b).

## Civil Procedure; expert witnesses—fees

Government Code § 68092.5 (amended).  
AB 3891 (Harris); 1988 STAT. Ch. 275

Under existing law, a party subpoenaing an expert to testify in a civil action or proceeding must pay the expert a reasonable fee for travel time and attendance at the proceeding.<sup>1</sup> Chapter 275 requires the party subpoenaing an expert<sup>2</sup> to compensate the witness at the

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1. CAL. GOV'T CODE § 68092.5. The court, upon a motion, may set the expert's compensation at an amount the court deems reasonable. *Id.* Generally, testifying witnesses are compensated at the rate of \$35.00 per day plus \$.20 a mile for travel. *Id.* § 68093.

2. *See id.* § 68092.5(a)(2) (Chapter 275 also applies to treating physicians and health care providers, but only if they are asked to express an opinion). *See generally* R. WEIL AND I. BROWN, CALIFORNIA PRACTICE GUIDE: *Civil Procedure Before Trial* § 8:1697.5 (1987) (discussing practical considerations for lawyers engaging in civil discovery, specifically with respect to expert witnesses).

witness' reasonable and customary hourly or daily fee for the entire time spent testifying.<sup>3</sup> The subpoenaing party must tender the expert's fee with the service of the subpoena or notice, or at the time set for the appearance.<sup>4</sup> The expert does not have to testify unless the subpoenaing party tenders the appropriate fee.<sup>5</sup> If a subpoenaing party believes the fee demanded by an expert is unreasonable, that party may move the court to set a reasonable fee for that expert.<sup>6</sup>

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3. CAL. GOV'T CODE § 68092.5(a) (requiring the party designating the expert to pay any fees charged by the expert for preparing the testimony as well as time and expenses incurred by the expert to appear and testify). See CAL. CIV. PROC. CODE § 2034(a) (setting forth the procedure for designating experts who are not a party or an agent or employee of a party to the action). Cf. *id.* §§ 2034(f)(2)(E) (a party designating an expert must provide opposing parties with a declaration from the expert witness specifying the expert's hourly and daily fee for testifying), 2034(i)(2) (requiring a party subpoenaing an expert to pay the expert's reasonable hourly and daily fee for the actual time the expert spends testifying).

4. CAL. GOV'T CODE § 68092.5(a) (the subpoenaing party must tender, to the attorney for the party designating the expert, an estimate of the expert's fee based on the time the expert will be testifying and must pay any additional fee due for the actual time spent testifying within five days of receiving an itemized bill from the expert).

5. *Id.* (the parties may stipulate otherwise).

6. *Id.* § 68092.5(c) (the court must set the expert's fee if the fee requested is found to be unreasonable and the moving party has, in good faith, attempted to resolve the fee dispute).

## Civil Procedure; good faith settlement—notice of hearing

Code of Civil Procedure § 877.6 (amended).

AB 2993 (Chandler); 1988 STAT. CH. 128

Sponsor: State Bar Association

Support: State Bar Committee on the Administration of Justice

Under existing law, any party who is a joint tortfeasor or co-obligor<sup>1</sup> on a contract debt may contest the good faith<sup>2</sup> of a settlement<sup>3</sup>

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1. See *Widson v. International Harvester Co.*, 153 Cal. App. 3d 45, 57, 200 Cal. Rptr. 136, 144 (1984) (the good faith settlement statute of Civil Procedure Code section 877.6 may apply to cross-defendants as well as defendants).

2. See *Ex-Cell-O Corp. v. Holdener*, 181 Cal. App. 3d 25, 31, 226 Cal. Rptr. 57, 60 (1986). To determine if a settlement is in good faith, a court may approximate a plaintiff's total recovery and consider a settlor's: proximate liability; the amount paid; the allocation of settlement; the settlor's financial condition; insurance policies; and the existence of collusion, fraud, or tortious conduct. *Id.*

3. See *Southern Cal. White Trucks v. Teresinski*, 190 Cal. App. 3d 1393, 1406, 236 Cal. Rptr. 159, 166 (1987) (settlement is a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment).

at a hearing providing that notice is either served personally or by mail<sup>4</sup> upon the parties.<sup>5</sup> Existing law also provides that the time in which parties are permitted to respond is extended when service is by mail.<sup>6</sup> With the enactment of Chapter 128, the extended response time for general mail service no longer applies to good faith settlement hearings.<sup>7</sup>

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4. CAL. CIV. PROC. CODE § 1012 (when service by mail permitted).

5. *Id.* § 877.6(a) (personal service requires 20 days notice, service by mail requires either 25 days if both parties are within the state, 30 days if one of the parties is in another state and 40 days if one of the parties is outside the United States). *See id.* §§ 1010 (notice must be in writing and state the grounds on which the hearing will be based), 1011 (service may be made personally, upon the attorney, or the attorney's office, or by mail). *See generally Review of Selected 1987 California Legislation*, 19 PAC. L.J. 427, 523 (1988) (discussing proof of service by mail).

6. CAL. CIV. PROC. CODE § 1005 (written notice of motion requires five days extension when both the place of mailing and address are within California, ten days if either the place of mailing or address is outside of California but within the United States and twenty days if either the place of mailing or address is outside the United States). *See id.* § 1013(a) (procedure for service by mail). *See generally* R. WEIL & I. BROWN, CALIFORNIA PRACTICE GUIDE, *Civil Procedure Before Trial* §§ 12:201-12:201.4 (1987) (extended notice is required when service is by mail).

7. CAL. CIV. PROC. CODE § 877.6(a) (Code of Civil Procedure sections 1005 and 1013(a) do not apply to Code of Civil Procedure section 877.6).

## Civil Procedure; grand juries—civil responsibilities

Penal Code §§ 888, 914.1, 915, 916, 926, 933, 939 (amended).  
SB 2753 (Royce); 1988 STAT. CH. 1297

Under existing law, grand juries have civil powers relating to the operation, management, and fiscal affairs of government officers.<sup>1</sup> Chapter 1297 permits grand juries to investigate or inquire into county matters of civil concern including the abolition or creation of offices, for purchasing, leasing or selling equipment, or for changing methods

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1. CAL. PENAL CODE § 925. *See generally* *Hawkins v. Superior Court*, 22 Cal. 3d 584, 593, 586 P.2d 916, 922, 150 Cal. Rptr. 435, 441 (preliminary hearings have supplanted the criminal powers of the grand jury); *CONTINUING EDUCATION OF THE BAR, CALIFORNIA CRIMINAL LAW PROCEDURES AND PRACTICE* §§ 8.22-8.27, at 159-161 (1986).

or systems.<sup>2</sup> The privacy requirements for criminal grand juries do not apply when the grand jury is operating in civil capacities.<sup>3</sup> Chapter 1297 requires a sufficient number of grand jurors to concur when making reports<sup>4</sup> and when documenting evidence to support the findings<sup>5</sup> and solutions for problems found in the report.<sup>6</sup> Final reports may be submitted to the presiding judge of the superior court at any time.<sup>7</sup> Upon a finding by the presiding judge that the report is in compliance with Chapter 1297's requirements, the report may be submitted for comment to responsible officers, agencies, or departments, including the county board of supervisors.<sup>8</sup> The elective officer or head of the agency must comment within sixty days, and the governing body of the public agency, subject to the report, must report to the presiding superior court judge within ninety days.<sup>9</sup>

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2. CAL. PENAL CODE § 888. *See* *People v. Cohen*, 12 Cal. App. 3d 298, 311, 90 Cal. Rptr. 612, 619 (1970) (grand juries in California have historically performed functions different from federal grand juries, which operate solely as part of the process of prosecution for crimes against federal law and have no other governmental function).

3. CAL. PENAL CODE § 939. No one other than the members of the grand jury may be present when the jurors are expressing their opinions. *Id.*

4. *See id.* § 940 (14 jurors must concur when the size of the grand jury is 23; 12 must concur when the size is 19). *See also id.* § 888.2 (counties with over four million in population require 23 jurors; other counties require 19).

5. CAL. PENAL CODE § 916 (documentation must include reports of contract auditors or consultants, official records, or interviews attended by no fewer than two grand jurors). *Id.*

6. *Id.* All problems must be accompanied by recommended solutions, including financial solutions, when applicable. *Id.*

7. *Id.* § 933(a).

8. *Id.* One copy of each report in compliance with Chapter 1297 must be placed and remain on file with the county clerk. *Id.*

9. *Id.* § 933(c). An information copy must be sent to the board of supervisors. *Id.* In a city, the mayor must also comment on the findings. *Id.* Copies of reports and comments will be filed with the clerk of the public agency, the county clerk, and the mayor when applicable. *Id.* *See People v. Superior Court*, 13 Cal. 3d 430, 441, 531 P.2d 761, 768, 119 Cal. Rptr. 193, 200 (1975) (if the proposed grand jury report exceeds established legal limits, the superior court, which convenes the grand jury and is responsible for supervising the jury, may properly refuse to file the report).

## Civil Procedure; hazardous substances—statute of limitations

Code of Civil Procedure §§ 338.1 (new), § 338 (amended); Health and Safety Code § 25360.4 (new); Penal Code § 803 (amended).

AB 4373 (La Follette); 1988 STAT. Ch. 1186

Sponsor: Department of Health Services

Existing law requires the Department of Health Services (Depart-



ment) to recover costs from the responsible party<sup>1</sup> for a hazardous substance<sup>2</sup> release.<sup>3</sup> Under Chapter 1186, a suit brought by the state to recover costs or administrative costs for removal<sup>4</sup> or remedial action,<sup>5</sup> or costs for assessing injury<sup>6</sup> or restoring<sup>7</sup> any natural resource injured by a release of a hazardous substance, must commence within three years of the certification by the Department that the state action has been completed.<sup>8</sup> The suit may be brought before the state action is completed, and a court entering a judgment must reserve jurisdiction for future liability determinations but may grant judgment to the Department for recovery of past costs or damages.<sup>9</sup>

Existing law requires the agencies bring suit within three years for civil penalties and punitive damages under provisions relating to hazardous waste.<sup>10</sup> Chapter 1186 extends the statute of limitations to five years from the time the agency bringing the suit discovers facts constituting the grounds for commencing the action.<sup>11</sup>

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1. CAL. HEALTH & SAFETY CODE § 25323.5 (definition of responsible party).
  2. *Id.* §§ 25316 (definition of hazardous substances), 25317 (excluding certain substances from the definition of hazardous substances).
  3. CAL. HEALTH & SAFETY CODE §§ 25385.9(b). *See id.* §§ 25320 (actions included in the definition of release), 25321 (excluding certain substances from the definition of release).
  4. CAL. HEALTH & SAFETY CODE § 25323 (definition of removal).
  5. *Id.* § 25322 (definition of remedial action).
  6. *Id.* § 25352(b) (injury includes short and long term injury, degradation or destruction of, or any loss of any natural resource resulting from a release of a hazardous substance, to the extent that costs are not reimbursed by the federal act and taking into account natural rehabilitation, restoration, and replacement).
  7. *Id.* § 25352(a) (restoring includes rehabilitating, replacing, or acquiring the equivalent of any natural resource injured, degraded, destroyed, or lost as a result of any release of a hazardous substance, to the extent costs are not reimbursed by the federal act and taking into account processes of natural rehabilitation, restoration, and replacement).
  8. *Id.* §§ 25360.4(a) (applies to Section 25360 actions), 25360.4(b) (applies to Health & Safety section 25352(a) or (b) actions).
  9. CAL. HEALTH & SAFETY CODE § 25360.4(c).
  10. CAL. CIV. PROC. CODE § 338.9.
  11. *Id.* § 338.1. This section includes damages authorized under the Code of Health & Safety sections 25300-25395 (hazardous substance account), 25280-25299.6 (underground storage of hazardous substances), 25100-25250.24 (hazardous waste control). *Id.*

**Civil Procedure; international commercial disputes—  
arbitration and conciliation**

Code of Civil Procedure §§ 1297.11, 1297.12, 1297.13, 1297.14, 1297.15, 1297.16, 1297.17, 1297.21, 1297.22, 1297.23, 1297.24, 1297.31, 1297.32, 1297.33, 1297.41, 1297.42, 1297.51, 1297.61, 1297.71, 1297.72, 1297.81, 1297.82, 1297.91, 1297.92, 1297.93, 1297.94, 1297.95, 1297.101, 1297.111, 1297.112, 1297.113, 1297.114, 1297.115, 1297.116, 1297.117, 1297.118, 1297.121, 1297.122, 1297.123, 1297.124, 1297.125, 1297.131, 1297.132, 1297.133, 1297.134, 1297.135, 1297.136, 1297.141, 1297.142, 1297.143, 1297.144, 1297.151, 1297.152, 1297.153, 1297.154, 1297.161, 1297.162, 1297.163, 1297.164, 1297.165, 1297.166, 1297.167, 1297.171, 1297.172, 1297.181, 1297.191, 1297.192, 1297.193, 1297.201, 1297.202, 1297.203, 1297.211, 1297.221, 1297.222, 1297.223, 1297.224, 1297.231, 1297.232, 1297.233, 1297.241, 1297.242, 1297.243, 1297.244, 1297.245, 1297.251, 1297.252, 1297.253, 1297.261, 1297.262, 1297.271, 1297.272, 1297.273, 1297.281, 1297.282, 1297.283, 1297.284, 1297.285, 1297.291, 1297.301, 1297.302, 1297.303, 1297.304, 1297.311, 1297.312, 1297.313, 1297.314, 1297.315, 1297.316, 1297.317, 1297.318, 1297.321, 1297.322, 1297.323, 1297.331, 1297.332, 1297.333, 1297.334, 1297.335, 1297.336, 1297.337, 1297.341, 1297.342, 1297.343, 1297.351, 1297.361, 1297.362, 1297.371, 1297.381, 1297.382, 1297.391, 1297.392, 1297.393, 1297.394, 1297.401, 1297.411, 1297.412, 1297.421, 1297.431, 1297.432 (new).

AB 2667 (Killea); 1988 STAT. CH. 23

Support: California Council for International Trade; Los Angeles Chamber of Commerce; California State Bar; California Trial Lawyers Association; California Chamber of Commerce; California Judges Association; San Diego Chamber of Commerce; California State World Trade Commission

Existing law provides for the enforcement of arbitration agreements.<sup>1</sup> Chapter 23 sets forth provisions governing international<sup>2</sup> commercial<sup>3</sup> arbitration<sup>4</sup> and conciliation.<sup>5</sup> The following material sets out the major provisions of Chapter 23.

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1. CAL. CIV. PROC. CODE § 1281.

2. *Id.* § 1297.13 (definition of international).

3. *Id.* § 1297.16 (definition of commercial).

4. *Id.* § 1297.21(c) (definition of arbitration).

5. *Id.* §§ 1297.11-1297.432. Chapter 23 is subject to any agreement in force between the

## I. FORM OF ARBITRATION AGREEMENT

Chapter 23 requires an arbitration agreement<sup>6</sup> to be in writing.<sup>7</sup> The agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.<sup>8</sup>

## II. AUTHORIZED JUDICIAL MEASURES IN AID OF ARBITRATION

Under Chapter 23, no court can intervene except where specifically provided in Chapter 23 or applicable federal law.<sup>9</sup> When a party to an arbitration agreement commences judicial proceedings regarding a matter covered by the agreement to arbitrate, Chapter 23 allows any other party to apply to the superior court for an order to stay the proceedings and to compel arbitration.<sup>10</sup> Chapter 23 also allows a party to the arbitration to request a superior court to impose an interim measure of protection,<sup>11</sup> or enforce an arbitral tribunal's award of an interim measure of protection.<sup>12</sup>

## III. COMPOSITION OF ARBITRAL TRIBUNALS

Under Chapter 23, the parties may agree on the number of

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United States and any other state or states. *Id.* § 1297.11. *See id.* § 1297.21(d) (definition of conciliation).

6. CAL. CIV. PROC. CODE § 1297.71 (definition of arbitration agreement).

7. *Id.* § 1297.72. An arbitration agreement is in writing if: (1) The agreement is in a document signed by the parties; (2) the agreement is in an exchange of letters, telex, telegrams; (3) the agreement is in other means of telecommunication which provide a record of the agreement; or (4) the agreement is in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. *Id.* The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract. *Id.*

8. *Id.* § 1297.71.

9. *Id.* § 1297.51.

10. *Id.* § 1297.81. Chapter 23 requires the court to grant a timely request for a stay of judicial proceedings. *Id.* § 1297.82.

11. *Id.* § 1297.91. The court may: (1) Order an attachment to assure that the award to which applicant may be entitled is not rendered ineffectual by the dissipation of party assets; or (2) grant a preliminary injunction in order to protect trade secrets or to conserve goods that are the subject matter of the arbitral dispute. *Id.* § 1297.93. In considering a request for interim relief, the court must give preclusive effect to any and all findings of fact of the arbitral tribunal, including the probable validity of the claim that is the subject of the award for interim relief and that the arbitral tribunal has previously granted in the proceeding in question, provided that such interim award is consistent with public policy. *Id.* § 1297.94. Where the arbitral tribunal has not ruled on an objection to its jurisdiction, the court must not give preclusive effect to the tribunal's findings until the court has made an independent finding as to the jurisdiction of the arbitral tribunal. *Id.* § 1297.95. If the court rules that the arbitral tribunal did not have jurisdiction, the application for interim measures of relief must be denied. *Id.* Such a ruling by the court that the arbitral tribunal lacks jurisdiction is not binding on the arbitral tribunal or subsequent judicial proceeding. *Id.*

12. *Id.* § 1297.92. Enforcement must be given pursuant to the law applicable to giving the type of interim relief requested. *Id.*

arbitrators<sup>13</sup> and on the procedure for appointing the arbitrators.<sup>14</sup> Chapter 23 requires all persons whose names have been submitted for appointment as arbitrators or conciliators to make specified disclosures.<sup>15</sup> Chapter 23 also provides the conditions under which an arbitrator can be challenged.<sup>16</sup>

#### IV. JURISDICTION OF ARBITRAL TRIBUNALS

Chapter 23 provides the procedure for making a jurisdictional challenge and empowers the arbitral tribunal to rule on its own jurisdiction.<sup>17</sup> Unless otherwise agreed by the parties, the arbitral tribunal is empowered under Chapter 23, at the request of a party, to order a party to take any interim measure of protection as the arbitral tribunal considers necessary in respect of the subject matter of the dispute.<sup>18</sup>

#### V. MANNER AND CONDUCT OF ARBITRATION

Under Chapter 23, the parties can agree on the arbitral tribunal's procedure for conducting the proceedings.<sup>19</sup> If the parties do not agree on the procedure, Chapter 23 empowers the arbitral tribunal

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13. *Id.* § 1297.101. If the parties do not agree on the number of arbitrators, there will be one arbitrator. *Id.*

14. *Id.* § 1297.112. *See id.* §§ 1297.113-1297.115; 1297.118 (procedure for appointing arbitrator if parties fail to agree).

15. CAL. CIV. PROC. CODE § 1297.121. Disclosure is mandatory and cannot be waived as to the parties with respect to persons serving either as the sole arbitrator or sole conciliator or as the chief or prevailing arbitrator or conciliator. *Id.* § 1297.122. The parties may otherwise agree to waive such disclosure. *Id.* The arbitrator's duty to disclose continues throughout the arbitral proceedings. *Id.* § 1297.123.

16. *Id.* § 1297.124. Parties who appoint or participate in the appointment of an arbitrator may challenge the appointment only for reasons of which those parties become aware after the appointment has been made. *Id.* § 1297.125. Unless the challenged arbitrator withdraws from his office, or the other party agrees to the challenge, the arbitral tribunal must decide on the challenge. *Id.* § 1297.133. If a challenge is not successful, the challenging party may request the superior court, within 30 days after having received notice of the decision rejecting the challenge, to decide on the challenge. *Id.* § 1297.134. The decision of the superior court is final, not subject to appeal. *Id.* § 1297.135. While a request is pending before the superior court, the arbitral tribunal may continue with the arbitral proceedings and make an arbitral award. *Id.* § 1297.136.

17. *Id.* §§ 1297.161-1297.165. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, the party will be deemed to have waived objection to such finding unless they request the superior court, within 30 days of notice of the ruling, to decide the matter. *Id.* § 1297.166. While this request is pending, the arbitral tribunal can continue with the arbitral proceedings and make an arbitral award. *Id.* § 1297.167.

18. *Id.* § 1297.171. The arbitral tribunal can require a party to provide appropriate security in connection with an order to take an interim measure. *Id.* § 1297.172.

19. *Id.* § 1297.191.

procedure for conducting the proceedings.<sup>19</sup> If the parties do not agree on the procedure, Chapter 23 empowers the arbitral tribunal to conduct the arbitration in the manner it considers appropriate.<sup>20</sup>

Chapter 23 requires the parties to be treated with equality and to be given full opportunity to present their case.<sup>21</sup> Under Chapter 23, the claimant must state the facts supporting his claim, the points at issue, and the relief or remedy sought.<sup>22</sup> The respondent is required to state his defense in respect to these particulars, unless the parties otherwise agree as to the required elements of these statements.<sup>23</sup> Unless otherwise agreed by the parties, Chapter 23 empowers the arbitral tribunal to conduct the arbitration orally or on the basis of documents and other materials.<sup>24</sup> Chapter 23 also provides for the use and conduct of expert witnesses.<sup>25</sup>

Chapter 23 provides the procedure for consolidating two or more arbitration agreements where the parties have agreed to consolidate.<sup>26</sup>

## VI. MAKING OF ARBITRAL AWARDS AND TERMINATION OF PROCEEDINGS

Chapter 23 requires the arbitral tribunal to decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute.<sup>27</sup> If the parties do not designate

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20. *Id.* § 1297.192. The arbitral tribunal's power includes the power to determine the admissibility, relevance, materiality, and weight of any evidence. *Id.* § 1297.193.

21. *Id.* § 1297.181.

22. *Id.* § 1297.231.

23. *Id.* The parties can submit with their statements all documents they consider relevant or can add a reference to the documents or other evidence they will submit. *Id.* § 1297.232. Unless otherwise agreed by the parties, either party can amend or supplement his claim or defense during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement due to delay. *Id.* § 1297.233. Unless otherwise agreed by the parties, where, without showing sufficient cause, the claimant fails to communicate his statement of claim in accordance with Code of Civil Procedure sections 1297.231 and 1297.232, the arbitral tribunal must terminate the proceedings. *Id.* § 1297.251. Unless otherwise agreed by the parties, where, without showing sufficient cause, the respondent fails to communicate his statement of defense in accordance with Code of Civil Procedure sections 1297.231 and 1297.232, the arbitral tribunal must continue the proceedings without treating that failure in itself as an admission of the claimant's allegations. *Id.* § 1297.252.

24. *Id.* § 1297.241. However, Chapter 23 requires the arbitral tribunal to hold oral hearings if requested by a party, and if there is no agreement between the parties that there will be no oral hearings. *Id.* § 1297.242.

25. *Id.* § 1297.261. Under Chapter 23, if a party so requests, or if the arbitral tribunal considers it necessary, the expert must, after delivering his written or oral report, participate in an oral hearing where the parties have the opportunity to question the expert and to present expert witnesses on the points at issue. *Id.* § 1297.262.

26. *Id.* § 1297.272. Chapter 23 should not be construed to prevent the parties to two or more arbitrations from agreeing to consolidate those arbitrations and taking any steps that are necessary to effect that consolidation. *Id.* § 1297.273.

27. *Id.* § 1297.281. Any designation by the parties of the law or legal system of a given state must be construed, unless otherwise expressed, as directly referring to the substantive law of that state, and not to its conflict of laws rules. *Id.* § 1297.282.

the applicable rules of law, Chapter 23 requires the arbitral tribunal to apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.<sup>28</sup> Chapter 23 specifies that, unless otherwise agreed by the parties, any decision of the arbitral tribunal must be made by a majority of its members.<sup>29</sup>

Under Chapter 23, an arbitral award must be in writing and signed by the members of the arbitral tribunal.<sup>30</sup> Unless otherwise agreed by the parties, Chapter 23 provides that the costs of an arbitration will be at the discretion of the arbitral tribunal.<sup>31</sup> Chapter 23 further provides that the arbitral tribunal can award interest, unless otherwise agreed by the parties.<sup>32</sup>

Chapter 23 provides that arbitral proceedings are terminated by either a final arbitral award or an order of the arbitral tribunal.<sup>33</sup> Chapter 23 further provides that an award is final upon the expiration of applicable periods for correction and interpretation of awards and for granting additional awards.<sup>34</sup>

28. *Id.* § 1297.283. The arbitral tribunal shall decide in justice and fairness or in favor of natural equity, if the parties have expressly authorized it to do so. *Id.* § 1297.284. In all cases, the arbitral tribunal must decide in accordance with the terms of the contract and must take into account the trade usages applicable to the transaction. *Id.* § 1297.285.

29. *Id.* § 1297.291. Notwithstanding this section, a presiding arbitrator, if authorized by the parties or by all members of the arbitral tribunal, may decide questions of procedure. *Id.* Chapter 23 states that encouraging settlement is not incompatible with an arbitration agreement. *Id.* § 1297.301. The arbitral tribunal can, with the agreement of the parties, use mediation, conciliation, or other procedures at any time during arbitral proceedings to encourage settlement. *Id.* If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal must terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. *Id.* § 1297.302. An arbitral award on agreed terms must state that it is an arbitral award and has the same status and effect as any other arbitral award on the substance of the dispute. *Id.* §§ 1297.303, 1297.304.

30. *Id.* § 1297.311. The arbitral award must: (1) State the reasons upon which it is based, unless the parties have agreed that no reasons are to be given, or that the award is an arbitral award on agreed terms; and (2) state the date and place of arbitration. *Id.* §§ 1297.313-1297.314. Chapter 23 empowers the arbitral tribunal to make an interim arbitral award, at any time during the arbitral proceedings, on any matter with respect to which it may make a final arbitral award. *Id.* § 1297.316. The interim award may be enforced in the same manner as a final arbitral award. *Id.*

31. *Id.* § 1297.318(a).

32. *Id.* § 1297.317.

33. *Id.* § 1297.321. The arbitral tribunal must issue an order terminating the arbitral proceedings if: (1) The claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognizes a legitimate interest on the respondent's part in obtaining a final settlement of the dispute; (2) the parties agree on the termination of the proceedings; or (3) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible. *Id.* § 1297.322.

34. *Id.* § 1297.321. Under Chapter 23, unless otherwise agreed by the parties, the parties may request the arbitral tribunal to: (1) Correct any computation errors, any clerical or typographical errors, or any other errors of a similar nature; or (2) give an interpretation of a specific point or part of the arbitral award. *Id.* § 1297.331(a), (b). Chapter 23 further

## VII. CONCILIATION

Chapter 23 states that it is the policy of the State of California to encourage parties to an international commercial agreement or transaction to resolve disputes arising from such agreements or transactions through conciliation.<sup>35</sup> Under Chapter 23, the parties may select or permit an arbitral tribunal or other third party to select one or more persons to serve as the conciliator or conciliators.<sup>36</sup> Chapter 23 permits the conciliator to conduct the conciliation proceedings in a manner he considers appropriate.<sup>37</sup> Chapter 23 also provides that the parties can appear in person or be represented or assisted by any person of their choice.<sup>38</sup>

Under Chapter 23, when persons agree to participate in conciliation, any document, or any statement, made or used in the course of the conciliation is not admissible in evidence, and disclosure of any such evidence must not be compelled in any civil action.<sup>39</sup>

Chapter 23 provides that the agreement of the parties to submit a dispute to conciliation constitutes an agreement between those parties to stay all judicial or arbitral proceedings from the commencement of conciliation until the termination of conciliation proceedings.<sup>40</sup>

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provides that, unless otherwise agreed by the parties, a party can request, within 30 days after receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to the claims presented in the arbitral proceedings but omitted from the arbitral award. *Id.* § 1297.334. Chapter 23 empowers the arbitral tribunal to extend, if necessary, the period of time within which it will make a correction, give an interpretation, or make an additional arbitral award. *Id.* § 1297.336.

35. *Id.* § 1297.341. By submitting to conciliation, no party waives any rights or remedies which that party would have had if conciliation had not been initiated, other than those set forth in any settlement agreement which results from the conciliation. *Id.* § 1297.394.

36. *Id.* § 1297.341. The conciliator must assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of the dispute. *Id.*

37. *Id.* § 1297.343. The conciliator must take into account the circumstances of the case, the wishes of the parties, and the desirability of a speedy settlement of the dispute. *Id.* Except as otherwise provided in this title, the following does not apply to conciliation proceedings: (1) Other provisions of this code; (2) the Evidence Code; or (3) the California Rules of Court. *Id.*

38. *Id.* § 1297.351. A person assisting or representing a party does not need to be a member of the legal profession or licensed to practice law in California. *Id.*

39. *Id.* § 1297.371(a). This subdivision does not limit the admissibility of evidence if all parties participating in conciliation consent to its disclosure. *Id.* In the event that any such evidence is offered in contravention of Chapter 23, the arbitration tribunal or the court must make any order that it considers appropriate in dealing with the matter. *Id.* § 1297.371(b). Unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, the conciliation, or any copy thereof, is admissible in evidence. *Id.* § 1297.371(c).

40. *Id.* § 1297.381.

Chapter 23 provides the circumstances for termination of conciliation as to all parties<sup>41</sup> and as to particular parties.<sup>42</sup> Chapter 23 provides that if the result of the conciliation is reduced to writing and signed by the conciliator and the parties, the written agreement is the equivalent of an arbitral award rendered by an arbitral tribunal and will have the same force and effect as a final award in arbitration.<sup>43</sup>

Chapter 23 requires the conciliator, upon termination of the conciliation proceedings, to fix the costs of the conciliation and give written notice thereof to the parties.<sup>44</sup> Chapter 23 provides that the parties will bear the costs equally unless the settlement agreement provides for a different apportionment.<sup>45</sup>

Chapter 23 provides that the conciliator, parties, and representatives are not subject to service of process on any civil matter while they are present in this state for the purpose of arranging for or participating in conciliation.<sup>46</sup> Chapter 23 further provides that a conciliator is exempt from liability in an action for damages resulting from any act or omission in the performance of his role as a conciliator in any proceeding.<sup>47</sup> Furthermore, Chapter 23 provides that the following will not be deemed as consent to the jurisdiction of any court in this state in the event conciliation fails: (1) Requesting conciliation; (2) consenting to participate in conciliation proceedings; (3) participating in such proceedings; and (4) entering into a conciliation agreement or settlement.<sup>48</sup>

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41. The proceedings may be terminated as to all parties by any of the following: (1) A written declaration of the conciliator after consultation with the parties, to the effect that further efforts at conciliation are no longer justified; (2) a written declaration of the parties addressed to the conciliator or conciliators to the effect that the conciliation proceedings are terminated; or (3) the signing of a settlement agreement by all of the parties. *Id.* § 1297.391.

42. The proceedings can be terminated as to particular parties by either of the following: (1) A written declaration of a party to the other party and the conciliator, if appointed, that the conciliation proceedings must be terminated as to that particular party; or (2) the signing of a settlement agreement by some of the parties. *Id.* § 1297.392(a),(b).

43. *Id.* § 1297.401.

44. *Id.* § 1297.411. Costs include only: (1) A reasonable fee to be paid to the conciliator; (2) the travel and other reasonable expenses of the conciliator; (3) the travel and other reasonable expenses of witnesses requested by the conciliator, with the consent of the parties; (4) the cost of any expert advice requested by the conciliator with the consent of the parties; and (5) the cost of any court. *Id.* § 1297.411(a)-(e).

45. *Id.* § 1297.412. All other expenses incurred by a party shall be borne by that party. *Id.*

46. *Id.* § 1297.431.

47. *Id.* § 1297.432.

48. *Id.* § 1297.421.



## Civil Procedure; relief from default judgments—sanctions

Code of Civil Procedure § 473 (amended).

SB 1975 (Davis); 1988 STAT. Ch. 1131

Support: California State Bar

Existing law provides that if a defendant fails to answer a complaint, the court may grant a default judgment.<sup>1</sup> Upon receiving an application for relief,<sup>2</sup> the court may, in the furtherance of justice, relieve a party from a default judgment caused by mistake, inadvertence, surprise, or excusable neglect.<sup>3</sup> Chapter 1131 provides that when an application for relief accompanies an attorney's sworn affidavit attesting to the attorney's mistake, inadvertence, surprise, or neglect the court must relieve the party of the default judgment.<sup>4</sup> If the court grants relief based on an attorney's affidavit of fault, the court must order the attorney to pay to the opposing counsel or party reasonable fees and costs.<sup>5</sup> Additionally, under Chapter 1131, after granting relief from a default judgment the court may: (1) Impose a fine no greater than \$1,000;<sup>6</sup> (2) direct the offending attorney to pay the State Bar Client Security Fund an amount not to exceed \$1,000; or (3) impose other appropriate relief.<sup>7</sup>

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1. CAL. CIV. PROC. CODE § 585.

2. *Id.* § 473 (a supporting affidavit or declaration of merit is not required to accompany the application).

3. *Id.* A copy of the answer or pleading must accompany the application for relief. *Id.* If the judgment affects personal or real property the application must be filed within 90 days, otherwise the application must be filed within six months. *Id.* See *Summit Care-California Inc. v. Dept. of Health Services*, 186 Cal. App. 3d 1584, 1589, 231 Cal. Rptr. 476, 479 (1986) (request for relief from the default judgment is proper one year and six months after the decision); *Carrasco v. Craft*, 164 Cal. App. 3d 796, 807, 210 Cal. Rptr. 599, 606 (1985) (the court has discretion to grant or deny a motion for relief of default judgment, even though default judgment was taken with "quiet speed").

4. CAL. CIV. PROC. CODE § 473 (the application must be timely, in proper form, and accompanied by the attorney's affidavit). See *Carli v. Superior Court*, 152 Cal. App. 3d 1095, 1099, 199 Cal. Rptr. 583, 585 (1984) (attorney's loss of a tape was excusable neglect and grounds for relief from default judgment). See generally R. King, *Catch-22 for Attorney Neglect*, 7 L.A. LAWYER 32 (1984) (discussing the ways in which courts deal with inexcusable attorney neglect).

5. CAL. CIV. PROC. CODE § 473. See generally *Mitchell v. State Dept. of Transp.*, 163 Cal. App. 3d 1016, 210 Cal. Rptr. 266, (1985) (the attorney's determination that no cause of action existed was not excusable neglect); *Lint v. Chisholm*, 121 Cal. App. 3d 615, 177 Cal. Rptr. 314, (1981) (an attorney's failure to inform the court of his change of address, resulting in delayed and lost mail, was not excusable neglect or surprise); D. Smallwood, *Vacating Judgments: The Extrinsic Fraud Rule*, 13 WEST. ST. U.L.REV. 105 (1985) (analyzing default judgments based on fraud).

6. CAL. CIV. PROC. CODE § 473 (the court may impose a penalty on either the offending attorney or the defaulting party).

7. *Id.*

## Civil Procedure; small claims court—monetary jurisdiction

Code of Civil Procedure § 116.2 (amended).

AB 1913 (Harris); 1988 STAT. Ch. 481

Under existing law, small claims courts have monetary jurisdiction of actions for up to fifteen hundred dollars.<sup>1</sup> With certain exceptions,<sup>2</sup> Chapter 481 increases the monetary jurisdictional limit of small claims courts from fifteen hundred dollars to two thousand dollars, and dictates a further increase from two thousand dollars to twenty-five hundred effective on January 1, 1991.<sup>3</sup>

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1. CAL. CIV. PROC. CODE § 116.2(a). The small claims divisions of the municipal and justice courts were created to resolve individual minor civil disputes in an expeditious, inexpensive, and fair manner because these disputes have significant social and economic consequences. *Id.* § 116.1.

2. The jurisdictional limit will remain \$1,500 for actions against a defendant grantor required to respond to a claim based on the default, actions, or omissions of another. *Id.* § 116.2(e).

3. *Id.* § 116.2. Both increases in the monetary jurisdictional limits apply to actions based on: (1) Delinquent unsecured personal property taxes; (2) an unlawful detainer after default of rent on a month to month tenancy; and (3) the issuance of a writ of possession by an innkeeper. *Id.* § 116.2(b)-(d).

## Civil Procedure; stay upon motion to post bond

Code of Civil Procedure § 1030 (amended).

SB 2331 (Kopp); 1988 STAT. Ch. 189

Prior law provided for an automatic stay of a civil proceeding when a defendant moved the court for an order requiring an out of state plaintiff<sup>1</sup> to file a bond.<sup>2</sup> Chapter 189 eliminates the automatic

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1. CAL. CIV. PROC. CODE § 1030(a) (plaintiff includes a person or a foreign corporation).

2. *Id.* § 1030(e). The motion must be filed within 30 days of service. *Id.* Bond includes surety, fidelity, indemnity or like bonds executed by both principal and sureties or executed by surety alone. *Id.* § 995.140(a). The purpose of the bond statutes is to deter frivolous litigation and to secure a defendant's judgment. See California Law Revision Commission, *Recommendations Relating to Security for Costs*, 14 CAL. L. REV. COMM'N REP. 319, 323 (1978). See generally 6 B. WITKIN, CALIFORNIA PROCEDURE, 190 (1985) (discussion of purpose and uses for bonds).

stay provision.<sup>3</sup> Rather, under Chapter 189, the court has discretion as to whether to order an out of state plaintiff to post an undertaking.<sup>4</sup>

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3. CAL. CIV. PROC. CODE § 1030.

4. *Id.* § 1030(c). The defendant must give notice of the motion. *Id.* § 1030(c). A hearing on the application must be held within 60 days of the service of the summons. *Id.*

## Civil Procedure; stop notices

Civil Code §§ 3103, 3159, 3161, 3162 (amended).  
SB 2347 (Vuich); 1988 STAT. Ch. 1627

Prior law did not allow an original contractor to give a stop notice or bonded stop notice to a construction lender.<sup>1</sup> Chapter 1627 authorizes an original contractor to give a construction lender a stop notice or bonded stop notice for private works of improvement.<sup>2</sup> By allowing an original contractor to use a stop notice in prescribed circumstances, Chapter 1627 protects an original contractor against mechanics' lien priority problems that might render the lien valueless.<sup>3</sup>

Furthermore, prior law did not allow an original contractor to give a stop notice or bonded stop notice to a construction lender if a payment bond had been recorded.<sup>4</sup> Chapter 1627 requires the construction lender to withhold funds pursuant to a bonded stop notice filed by an original contractor even if a payment bond has been

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1. 1971 Cal. Stat. ch. 1284, sec. 5, at 2517 (enacting CAL. CIV. CODE section 3159).

2. CAL. CIV. CODE § 3159. See generally *id.* §§ 3156-3175 (stop notices for private works of improvement); 2 A. BOWMAN, OGDEN'S REVISED CALIFORNIA REAL PROPERTY LAW §§ 20.22, 20.23 (1975 & Supp. Mar. 1987) (description of stop notices); CONTINUING EDUCATION OF THE BAR, CALIFORNIA MECHANICS' LIENS AND OTHER REMEDIES §§ 1.72-1.78 (1988) (stop notices for private works of improvement); Comment, *California Private Stop Notice Law: Due Process Requirements*, 25 HASTINGS L.J. 1043 (1974) (describing and analyzing stop notices).

3. See M. MARSH, CALIFORNIA MECHANICS' LIEN LAW § 5.3 (4th ed. 1937) (advantages of stop notice over mechanics' lien); 3 B. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 161 (3rd ed. 1935) (stop notice protects against priority problems of mechanics' lien).

4. 1971 Cal. Stat. ch. 1284, sec. 5, at 2517 (enacting CAL. CIV. CODE section 3159). See generally CONTINUING EDUCATION OF THE BAR, *supra* note 2, at § 6.15 (payment bond provides protection against stop notice); M. MARSH, *supra* note 3, at §§ 4.164-4.170, 8.44 (4th ed. 1987) (analysis of payment bonds and the lien claimant suit).

recorded.<sup>5</sup> Chapter 1627 additionally authorizes, but does not require, the construction lender to withhold funds pursuant to a stop notice or bonded stop notice given by anyone other than the original contractor when a payment bond has been recorded.<sup>6</sup> Chapter 1627 is unclear as to whether construction lenders still cannot withhold funds pursuant to a stop notice filed by an original contractor when a payment bond has been previously recorded.<sup>7</sup>

Under prior law, when an owner undertook construction on his or her own behalf, anyone who entered into a contract with the owner was defined as a subcontractor.<sup>8</sup> Chapter 1627 removes this language from the statute.<sup>9</sup> Case law provides guidance on whether a person entering into a contract with the owner will be treated as an original contractor or a subcontractor for stop notice purposes when a payment bond has been previously recorded.<sup>10</sup>

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5. CAL. CIV. CODE § 3159.

6. *Id.* If the construction lender decides not to withhold funds after the receipt of a stop notice, the lender must, upon proper request, provide the claimant a copy of the payment bond within 30 days. *Id.*

7. Compare 1971 Cal. Stat. ch. 1284, sec. 5, at 2517 (enacting CAL. CIV. CODE section 3159) (recording a payment bond prevents service of a stop notice or bonded stop notice on a construction lender) with CAL. CIV. CODE § 3159 (construction lender shall withhold funds when an original contractor files a bonded stop notice) and *id.* (construction lender may withhold funds when persons other than a contractor file a stop notice or a bonded stop notice).

8. 1971 Cal. Stat. ch. 1284, sec. 5, at 2517 (enacting CAL. CIV. CODE section 3159).

9. CAL. CIV. CODE § 3159.

10. *E.g.* *Miller v. Mountain View Sav. and Loan Ass'n*, 238 Cal. App. 2d 644, 48 Cal. Rptr. 278 (1965). The courts have often been willing to construe liberally statutes to protect mechanics and materialmen when their work enhances the value of the owners' property. *Id.* at 655, 48 Cal. Rptr. at 286. To protect the interests of mechanics and materialmen, the court held in *Miller* that when an owner undertakes construction on his own behalf, those who contract with the owner for portions of the work are subcontractors. *Id.*

## Civil Procedure; unlawful detainer

Code of Civil Procedure §§ 712.010, 712.020, 1174.2, 1174.3 (amended).

AB 4213 (M. Waters); 1988 STAT. Ch. 1405

Under existing law, after a judgment for possession or sale of real property has been entered in an action for unlawful detainer, the

judgment creditor may obtain a writ of possession or sale.<sup>1</sup> Also under existing law, occupants of residential premises who are not named in the judgment may object to enforcement of the judgment against them by filing a claim of right to possession.<sup>2</sup> This objection may be made to the levying officer at the premises at the time of eviction.<sup>3</sup>

With the enactment of Chapter 1405, an occupant can effect a claim of right to possession by presenting the levying officer with the appropriate form and delivering to the court within forty-eight hours the appropriate fees or the form for proceeding in forma pauperis, either with or without a deposit.<sup>4</sup> The claim can also be effected by filing the appropriate form directly with the court, along with the appropriate fees or form for forma pauperis, and either with or without a deposit equal to fifteen days' rent.<sup>5</sup> If the court determines that the claim is invalid, any deposit must be returned to the occupant, less the judgment creditor's pro rata share for each day enforcement of the judgment was delayed.<sup>6</sup>

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1. CAL. CIV. PROC. CODE § 710.010. Chapter 1405 requires that both the application for the writ and the writ itself include the daily rental value of the property. *Id.* §§ 712.010, 712.020(e). The statement of rental value must be made under penalty of perjury, and give the rental value on the date on which the complaint for unlawful detainer was filed. *Id.* § 712.010.

2. *Id.* § 1174.3(a). The California Supreme Court held that the eviction of a person not named in the writ of possession violates the due process protections of the federal and state constitutions. *Arrieta v. Mahon*, 31 Cal. 3d 381, 389, 644 P.2d 1254, 1259, 182 Cal. Rptr. 770, 775 (1982). See generally *Review of Selected 1987 California Legislation* 19 PAC. L.J. 427, 527-28 (1987) (notice requirements in unlawful detainer actions).

3. CAL. CIV. PROC. CODE § 1174.3(b). Under prior law, an occupant could also object to eviction at the office of the levying officer. 1986 Cal. Stat. ch. 1220, sec. 2, at \_\_\_\_ (enacting CAL. CIV. PROC. CODE § 1174.3(b)). The claim of right to possession was effected by presenting the levying officer with the appropriate form and sending to the court the appropriate fee or form for proceeding in forma pauperis. *Id.* at \_\_\_\_ (enacting CAL. CIV. PROC. CODE § 1174.3(c)). Under Chapter 1405, the occupant may object to the court. CAL. CIV. PROC. CODE § 1174.3(b).

4. *Id.* § 1174.3(c)(1), (2). The deposit must equal fifteen days' rent. *Id.* § 1174.3(c)(1). If the claimant makes the deposit with the court, a hearing on the claim must be set and held between five and fifteen days after the claim has been filed. *Id.* If the claimant does not make the deposit, the court must set the hearing for the fifth day following the filing. *Id.* § 1174.3(c)(2).

5. *Id.* § 1174.3(c)(3), (4). If the claimant makes the deposit with the court, a hearing on the claim must be set and held between five and fifteen days after the claim has been filed. *Id.* If the claimant does not make the deposit, the court must set the hearing for the fifth day following the filing. *Id.* § 1174.3(c)(4). If the claimant files with the court or presents to the levying officer the appropriate form, but does not deliver the fee or form for forma pauperis to the court, the court must immediately deny the claim. *Id.* § 1174.3(f). Chapter 1405 amends the form the occupant must complete to file a claim of right to possession. *Id.* § 1174.3(g).

6. *Id.* § 1174.3(d). If the court determines the claim is valid, the entire deposit must be returned to the occupant. *Id.*